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IN THE

Supreme Court of the United States.

October Term, 1929.

No. ~~802~~ 113

THE POTTSTOWN IRON COMPANY, *Petitioner,*

v.

THE UNITED STATES OF AMERICA.

MOTION OF PETITIONER TO ADVANCE.

PAUL F. MYERS,
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Washington, D. C.

IN THE

Supreme Court of the United States.

October Term, 1929.

No. 892.

THE POTTSTOWN IRON COMPANY, *Petitioner*,

v.

THE UNITED STATES OF AMERICA.

MOTION OF PETITIONER TO ADVANCE.

Comes now Paul F. Myers, attorney for the petitioner in the above entitled cause and moves that this case be advanced for hearing immediately following the cases of *United States* v. *Boston Buick Company* and *United States* v. *Iron Cap Copper Company*, Nos. 632 and 633, October Term, 1929, respectively, and in support of his motion makes the following brief statement of the matter involved and the reasons relied upon for the advancement.

STATEMENT OF THE MATTER INVOLVED.

This case presents the question as to when a credit of an overpayment of income and excess profits taxes for one or more years against an additional assessment of taxes for other years is allowed and or taken within the meaning of the revenue statutes.

Briefly, the facts are that the Commissioner of Internal Revenue found that the petitioner had overpaid its taxes for 1918 in the amount of $250,871.34 and had underpaid its taxes for the years 1916 and 1917 in the total amount of $229,719.22.

The additional assessments for 1916 and 1917 were made by

the Commissioner on January 22, 1926, while on January 29, 1926, the Commissioner approved a Schedule of Overassessments which embraced the aforementioned overpayment for the year 1918. Said Schedule was transmitted by the Commissioner to the Collector of Internal Revenue at Philadelphia, Pa., with authorization to the Collector to apply the said overpayment for 1918 against outstanding liabilities for other years as shown by the taxpayer's accounts on the Collector's records. On February 23, 1926, the Collector, in response to an inquiry from the petitioner, advised the petitioner in writing that he had applied a portion of the said overpayment for 1918, to-wit, $229,719.22, to close out the accounts for 1916 and 1917, which showed additional assessments in the said amount, and that the crediting and posting of this amount to the said accounts for 1916 and 1917 closed the petitioner's outstanding accounts on his records for the years 1916 to 1920 inclusive.

On February 27, 1926, the Collector returned the said Schedule of Overassessments (Form 7805) to the Commissioner, together with subsidiary schedule (Form 7805-A) showing the portion of the overpayment which had been credited to the petitioner on his records, and the portion of the said overpayment which was refundable to the petitioner. On April 15, 1926, the Commissioner signed a certificate on said subsidiary schedule (Form 7805-A) authorizing the Disbursing Clerk of the Treasury Department to issue checks covering the amount refundable as shown on said subsidiary schedule.

Under these facts the petitioner claimed that the said credit of the overpayment against the underpayments was allowed and taken prior to February 26, 1926, the date of the passage of the Revenue Act of 1926. The petitioner contended therefore that the provisions of the Revenue Act of 1924 were applicable in so far as the computation of interest on the amount of the credit was concerned. The Government, on the other hand, contended that the credit was taken subsequent to the date of passage of the Revenue Act of 1926, although allowed prior to that date, and that, therefore, the interest provisions of the Revenue Act of 1926 were applicable to the said credit. If the 1924 Act is applicable, the petitioner is entitled to interest on the credit from the date the 1918 tax was overpaid, which was June 11, 1919, to January 22, 1926, the date of the assessment of additional taxes for 1916 and 1917. If the pro-

visions of the 1926 Act are applicable, the petitioner is entitled to no interest on the credit of the overpayment against the underpayment of taxes for previous years.

The petitioner brought suit in the Court of Claims on June 3, 1927, for the interest which it claimed on this credit and on April 7, 1930, the said Court of Claims rendered an opinion (amended by order of April 21, 1930) dismissing the petitioner's suit and holding that the credit was taken and made effective within the meaning of the statutes on April 15, 1926, when the Commissioner signed the certificate on subsidiary schedule (Form 7805-A) authorizing the Disbursing Clerk of the Treasury Department to issue checks covering the refunds and interest payable in accordance with said schedule.

The petitioner thereupon, on May 13, 1930, filed a petition for a writ of certiorari with this Court, and the respondent has filed a memorandum in which it expresses no opposition to the granting of the writ.

REASONS RELIED UPON FOR THE ADVANCEMENT.

There are now pending before this Court, by virtue of writs of certiorari granted March 17, 1930, the cases of *United States* v. *Boston Buick Company*, *United States* v. *Iron Cap Copper Company*, Nos. 632 and 633, October Term, 1929, and *United States* v. *Swift & Company*, No. 700. In all of said cases the question at issue was the date of the allowance of a credit of an overpayment of taxes against an underpayment of taxes for other years. The dates of allowance of the credits in the first two mentioned cases were material because of the fact that the said dates of allowance would govern the applicability of the interest provisions of the Revenue Act of 1921 or of the Revenue Act of 1924.

In those cases the Circuit Court of Appeals for the First Circuit rendered opinions holding that the credits were allowed, as contended by the taxpayers, subsequent to the passage of the Revenue Act of 1924, and that, therefore, the provisions of that Act concerning the payment of interest on credits were applicable. The Court took the view that the credits were allowed, within the meaning of the statute, when the

Commissioner of Internal Revenue signed the subsidiary schedule (Form 7805-A) returned by the Collector to the Commissioner showing the amounts abated, credited and refundable, which signature of the Commissioner authorized the Disbursing Clerk of the Treasury Department to make the refunds of tax and interest therein shown. As pointed out in the Government's petition for writ of certiorari in the said cases and in brief in support thereof, the questions involved are of vast importance on account of the millions of dollars involved, and that there are conflicting opinions in the lower federal courts concerning the date of the allowance of a credit.

In the instant case the question involves not only the date of the allowance of the credit, but also the date upon which the taking of the credit became effective, and to properly settle the questions which have arisen in this type of case, a decision of this Court will be necessary not only as to when a credit is allowed, within the meaning of the statute, but also as to when the taking of the credit becomes effective, if the said taking of the credit is on some other date than the date upon which the credit is allowed.

In view of the fact that the instant case involves the same question as that presented in the *Boston Buick Company* case, the *Iron Cap Copper Company* case and the *Swift & Company* case, with the additional question of when the credit is taken as well as allowed, this motion is made that this case be heard by this Court immediately following the hearing in the other said cases.

Wherefore, the petitioner prays that this case be advanced upon the calendar and assigned for hearing immediately following the cases of *United States* v. *Boston Buick Company* and *United States* v. *Iron Cap Copper Company*, Nos. 632 and 633, October Term, 1929.

Respectfully submitted,

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THE POTTSTOWN IRON COMPANY, *Petitioner,*

v.

THE UNITED STATES OF AMERICA.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

THE OPINION OF THE COURT BELOW.

The opinion of the Court of Claims in this case has not yet been finally reported, but it appears at pages 20 to 23, inclusive, of the record.

II.

JURISDICTION.

The judgment of the Court of Claims was entered on April 7, 1930 (R. 23). However, a motion for amended findings of fact was filed, which was granted in part and overruled in part by the Court of Claims, and on order entered by said Court on April 21, 1930, revising in part the findings of fact and the opinion of the Court (R. 24). The petition for writ of certiorari was filed May, 13, 1930 (R. 24). The jurisdiction of this Court rests upon the provisions of Section 3 (b) of the Act of February 13, 1925 (c. 229, 43 Stat. 936, 939).

III.

STATEMENT OF THE CASE.

A full statement of the case has been given under heading "A" in the petition (R. 1) and, therefore, the statement is not repeated at this point in the brief.

IV.

STATUTES INVOLVED.

Revised Statutes, Sec. 3218 (U. S. C., Title 26, Sec. 147):

> Every collector shall be charged with the whole amount of taxes, whether contained in lists transmitted to him by the Commissioner of Internal Revenue, or by other collectors, or delivered to him by his predecessor in office, and with the additions thereto, with the par value of all stamps deposited with him, and with all moneys collected for penalties, forfeitures, fees, or costs; * * *

Revenue Act of 1924, c. 234, 43 Stat. 253, 296, 301, 346 (U. S. C., Title 26, Secs. 1045, 1046, 1065, 153):

> Sec. 271. As soon as practicable after the return is filed the Commissioner shall examine it and shall determine the correct amount of the tax.
>
> Sec. 272. If the taxpayer has paid as an installment of tax more than the amount determined to be the correct amount of such installment, the excess shall be credited against the unpaid installments, if any. If the amount already paid, whether or not on the basis of installments, exceeds the amount determined to be the correct amount of the tax, the excess shall be credited or refunded as provided in section 281.
>
> Sec. 281. (a) Where there has been an overpayment of any income, war-profits, or excess-profits tax imposed by this Act, the Act entitled "An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes," approved August 5, 1909, the Act entitled "An Act to reduce tariff duties and to provide revenue for the Government, and for other purposes," approved October 3, 1913, the Revenue Act of 1916, the Revenue Act of 1917, the Revenue Act of 1918, or the Revenue Act of 1921, or any such Act as amended,

the amount of such overpayment shall be credited against any income, war-profits, or excess-profits tax or installment thereof then due from the taxpayer, and any balance of such excess shall be refunded immediately to the taxpayer.

Sec. 1019. Upon the allowance of a credit or refund of any internal revenue tax erroneously or illegally assessed or collected, or of any penalty collected without authority, or of any sum which was excessive or in any manner wrongfully collected, interest shall be allowed and paid on the amount of such credit or refund at the rate of 6 per centum per annum from the date such tax, penalty, or sum was paid to the date of the allowance of the refund, or in case of a credit, to the due date of the amount against which the credit is taken, but if the amount against which the credit is taken is an additional assessment, then to the date of the assessment of that amount. The term "additional assessment" as used in this section means a further assessment for a tax of the same character previously paid in part.

Sections 271, 272, and 284 (a) of the Revenue Act of 1926 provide substantially the same as Sections 271, 272 and 281 (a) of the Revenue Act of 1924, supra. Section 1116 of the 1926 Act provides (44 Stat. 9, 119, sec. 153; Tit. 26, U. S. C.):

Section 1116 (a). Upon the allowance of a credit or refund of any internal revenue tax erroneously or illegally assessed or collected, or of any penalty collected without authority, or of any sum which was excessive or in any manner wrongfully collected, interest shall be allowed and paid on the amount of such credit or refund at the rate of 6 per centum per annum from the date such tax, penalty, or sum was paid to the date of the allowance of the refund, or in the case of a credit, to the due date of the amount against which the credit is taken, but if the amount against which the credit is taken is an additional assessment made under the Revenue Act of 1921, the Revenue Act of 1924, or this Act, then to the date of the assessment of that amount.

(b) As used in this section—

(1) The term "additional assessment" means a further assessment for a tax of the same character previously paid in part, and includes the assessment of a deficiency

under Title II or Title III of the Revenue Act of 1924 or of this Act;

(2) The term "date of the allowance of the refund" means, in the case of any income, war profits, or excess profits tax, the first date on which the Commissioner signs the schedule of overassessments in respect thereof.

(c) This section shall be applicable to any refund paid, and to any credit taken, on or after the date of the enactment of this Act, even though such refund or credit was allowed prior to such date.

V.

QUESTION PRESENTED.

Prior to the passage of the Revenue Act of 1926, the Commissioner of Internal Revenue signed a certificate on Form 7805 (Schedule of Overassessments), stating that the overassessments appearing thereon had been allowed, and directing the Collector to apply any overassessments against any taxes due from the taxpayers for other years. Prior to the passage of the Revenue Act of 1926 the Collector advised the petitioner that he had applied an overpayment for one year against taxes due for the two preceding years, and that the accounts of the petitioner on his records had been thereby closed. Subsequent to the passage of the Revenue Act of 1926 the Collector returned Form 7805 to the Commissioner with Form 7805-A, showing the amounts credited and the amounts refundable, and the Commissioner thereafter signed a certificate on Form 7805-A, directing the Disbursing Clerk to make payment of any amounts shown on said Form 7805-A to be refundable. The question, therefore, is whether interest on the credit of the overpayment against taxes for other years should be computed under the provisions of Section 1019 of the Revenue Act of 1924, or under the provisions of Section 1116 of the Revenue Act of 1926, the decision of which question will depend upon whether the said credit was allowed and/or taken while the Revenue Act of 1924 was in effect, or while the Revenue Act of 1926 was in effect.

VI.

SPECIFICATION OF ERRORS.

1. The Court of Claims erred in finding and holding that the credit of the 1918 overpayment against the 1916 and 1917 underpayments of tax was taken or became effective on April 15, 1926, the date upon which the Commissioner signed the certificate on subsidiary schedule (Form 7805-A) directing the disbursing clerk to issue checks in payment of the amounts therein shown to be refundable, and that, therefore, the interest provisions of the Revenue Act of 1926 are applicable to said credit.

2. The Court of Claims erred in failing to hold that the credit in question was taken or became effective prior to the passage of the Revenue Act of 1926, and that, therefore, the interest provisions of the Revenue Act of 1924 are applicable to the said credit.

VII.

ARGUMENT.

In the cases of *United States v. Boston Buick Company*, and *United States v. Iron Cap Copper Company*, Nos. 632 and 633, October Term, 1929, in which cases this Court has granted writs of certiorari to review judgments of the United States Circuit Court of Appeals for the First Circuit, reported in 35 Fed. (2d) 560, the Government conceded in its brief in support of the petition for the writ that the sole question was whether the provisions of the Revenue Act of 1921 or of the Revenue Act of 1924 should govern the computation of interest on the credit, and that this question depended solely on when the credit was "allowed."

In the instant case the Government contends that the provisions of the law in effect when the credit was "taken" should govern the computation of interest; that the credit in question was "allowed" prior to the passage of the Revenue Act of 1926 but that the said credit was not "taken" until the Commissioner of Internal Revenue mailed to the petitioner the certificates of overassessment and checks covering amounts

refundable with interest, and these were received by the petitioner.

The petitioners, on the other hand, contended that the credit in question was "taken" either, (1) when the credit was "allowed" as conceded by the Government, that is, when the Commissioner signed the certificate on the schedule of overassessments and authorized the Collector to apply any overpayments appearing thereon against outstanding liabilities for other years, or, (2) no later than when the Collector made the appropriate entries on the taxpayer's accounts in his records by which the credit was effected, and the outstanding liabilities for other years extinguished; that he had done this on or before February 23, 1926 as is evidenced by his written communication to the petitioner (R.), which was prior to the passage of the Revenue Act of 1926. Therefore, the provisions of the 1924 Act pertaining to the computation of interest should be applied to the credit in question.

The Court of Claims took the view that neither the Government nor the petitioner was correct in its contention, and that the taking of the credit in question was made effective by statute when the Commissioner signed the certificate on the subsidiary schedule (Form 7805-A) authorizing the disbursing clerk of the Treasury Department to pay the amounts shown by the said schedule to be refundable.

The decision of the Court of Claims follows an earlier decision by that Court in the case of *Swift & Company* v. *United States*, 68 Ct. Cls. 97, now pending before this Court on writ of certiorari granted March 17, 1930, and coincides with the decision of the Circuit Court of Appeals for the First Circuit in the *Boston Buick Company* and *Iron Cap Copper Company* cases. However, in all said cases the question of when the credit was "taken" was not considered, and a decision by this Court in those cases finally deciding when the credit was "allowed," will not determine the issue in the instant case because herein the Government contends that the credit was "taken" at a date subsequent to the allowance of the credit.

The petitioner is in full agreement with the contentions of the Government in the *Boston Buick Company* and *Iron*

Cap Copper Company cases. These contentions, briefly summarized, are as follows:

(1) That the case of *Girard Trust Company* v. *United States*, 270 U. S. 163, does not control the question of when the credit is "allowed" or "taken" because in that case the only question before this Court was as to the date a refund was allowed, and the procedure with reference to the allowance and taking of a credit is distinctly different from that concerning the allowance of a refund, which procedure concerning the credit was not presented to this Court at the time of the argument of the *Girard Trust Company* case.

(2) That the Commissioner's instructions to the Collector on Form 7805 constitute a positive order to the Collector to make the credit and reduce the tax liability of the taxpayer, and the Collector has no discretion except as to act as the Commissioner directs and as the state of the accounts warrants. The Collector by his act of crediting the overpayment against the underpayment for other years finally and absolutely extinguishes the liability of the taxpayer for said other years, and if the authorization by the Commissioner to make the said credit does not constitute an allowance of the credit, the taxpayer's liability for the other years could be discharged without the credit having been allowed by competent authority. When the Commissioner directs the Collector to ascertain whether any portion of the overassessment constitutes an overpayment and to apply the overpayments as a credit, he has made a final decision as to the disposition of the overpayment by way of credit and he never thereafter, either in a certificate of any kind or in a communication to the Collector, directs an allowance of a credit or refers to an allowance of a credit. In other words, although in cases of refunds the Commissioner takes some final action with respect thereto after the subsidiary schedule (Form 7805-A) is returned to him by the Collector, he takes no further action with respect to the credits which he has directed the Collector to

make. The total and unqualified benefit of the credit has been received by the taxpayer when the Collector makes the appropriate entries in his accounts necessary to extinguish the taxpayer's liabilities for other years. These additional liabilities are at that time obliterated, and nothing the Commissioner thereafter does in any way effects the extinguishment of the additional liabilities by the effectuating of the credit by the Collector.

(3) That this view finds further support when consideration is given to procedure in the Income Tax Unit and to the consequences which would flow from the adoption of the rule that a credit is not allowed until Form 7805-A is signed by the Commissioner.

The most obvious difficulty arises from the fact that under the procedure in effect when these credits were allowed the Commissioner did not in every case sign Form 7805-A. In any case where Form 7805 was returned from the Collector with the statement that there were no items refundable and no interest was to be paid on credits, the schedule was filed without being signed by the Commissioner.

Form 7920 has superseded Forms 7805 and 7805-A. Under the procedure governing the use of that form, the Commissioner makes only one certification. This certification contains instructions to the Collector practically identical with those on Form 7805, to which are added the following instructions:

> The Deputy Commissioner of Internal Revenue will compute the interest payable, list the same in column 8, and enter the respective total amounts payable in column 9 or 10, or both.
>
> The Disbursing Clerk, Treasury Department, is authorized to pay the amounts specified in column 9 or 10, or both.

The position which the Court of Claims has taken with respect to the date upon which the credit is allowed, or on

which the taking thereof becomes effective, has been approved by that Court in the cases of *West Leechburg Steel Company* v. *The United States*, unreported, decided April 7, 1930, and *Atlas Powder Company* v. *The United States*, unreported, decided April 7, 1930, in addition to the instant case. On the other hand, the District Court for the Western District of Pennsylvania in the case of *Penn Smokeless Coal Company* v. *The United States*, 34 Fed. (2d) 205, sustained the Government in its position that a credit was allowed when the Commissioner signed the certificate on the Schedule of Overassessments authorizing the Collector to apply the overpayment, if any, against any outstanding liabilities for other years. The said District Court in the case of *Pittsburgh Bridge & Iron Works* v. *United States*, unreported, decided November 2, 1929, approved its decision in the *Penn Smokeless Coal Company* case.

It is difficult to conceive how a credit of this nature can be "taken," or the said credit be made effective, subsequent to the date upon which said credit is "allowed." The allowance and taking of the credit, under the statute, would appear to be simultaneous. As was said by the Court of Claims in the case of *Atlas Powder Company* v. *The United States*, supra:

> "The parties in their briefs have confused the term 'credit taken.' The plaintiff contends that 'the Collector takes the credit,' while the defendant insists that 'the taxpayer takes the credit when he receives notice from the Commissioner that it has been made.' Neither position is correct. The law takes the credit * * *."

The petitioner agrees with the said Court in its view that the statute takes the credit, or in other words, that the credit is made effective when the requirements of the statute have been met. Under the statute, the Commissioner is the executive directly in charge of the administrative branch of the Government having to do with the assessment, collection, refund, and crediting of taxes. *Girard Trust Co.* et al. v. *United States*, supra. However, the Collectors of Internal Revenue are more than mere bookkeepers for the Commissioner as intimated by the Court of Claims in the *Atlas Powder Company* case, for the Revised Statutes, Sec. 3218, specifically

charge every Collector with the whole amount of taxes. The Commissioner is not charged with the collection, and keeps no accounts with the millions of taxpayers. When the Collector applies, in his records, an overassessment which the Commissioner has theretofore approved, against an additional tax liability of the taxpayer, every step has been consummated with respect to making effective the said credit which is required by statute. The Commissioner has "allowed" it when he approved the overassessment and directed the Collector to apply all or any portion thereof against additional liabilities for other years, and if it can possibly be contended that the credit is not taken or has not become effective under the statute at that time, it, beyond any doubt, is taken or becomes effective when the Collector has extinguished a liability of the taxpayer by the application of the said credit against the additional liability as shown by his accounts.

VIII.

CONCLUSION.

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, in order that the errors of the Court of Claims may be corrected, and that to such an end a writ of certiorari should be granted and this Court should review the decision of the Court of Claims and finally reverse it.

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